[redacted]

In The

Supreme Court of the United States

October Term, 1975

JOHN W. HEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

[redacted]
General Counsel of Record
(Appointed by This Court)
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A Professional Corporation
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QUESTIONS PRESENTED

Last term, this Court held in *Johnson v. Jones*, 115 S. Ct. 2151 (1995) that on an interlocutory appeal from a denial of a claim for qualified immunity, an appellate court lacked jurisdiction to review issues of evidence sufficiency. Prior to *Johnson*, this Court had granted Petitioner's request to review whether the Court of Appeals for the Ninth Circuit erred in dismissing Petitioner's appeal for lack of jurisdiction because Petitioner had already sought and secured a prior interlocutory appeal on that issue. As a result of *Johnson* and *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this case now presents the following questions:

1. Was the Court of Appeals correct in dismissing for lack of jurisdiction the appeal from the District Court's denial of Petitioner's summary judgment motion for qualified immunity when the appeal sought would raise only evidence sufficiency issues caused when Petitioner asserts as "given" hotly disputed issues of fact or facts found by the District Court to be contrary to that asserted by Petitioner?

2. Is the order of the District Court denying summary judgment "final" as required by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) if the Petitioner will be required to stand trial regardless of the outcome of any second appeal from that denial and could any second interlocutory appeal which raised purely legal issues concerning qualified indemnity possibly be "final"?

QUESTIONS PRESENTED – Continued

3. As a matter of public policy, should a governmental defendant be permitted to take two interlocutory appeals from denials of qualified immunity in light of the Circuits' experience that multiple appeals will be taken if permitted regardless of merits and in light of the substantial costs to civil rights plaintiffs and the judicial system or should such interlocutory appeals be limited to one at a time chosen by the governmental defendant?

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STATEMENT OF THE CASE

The underlying action involves the coerced termination of a savings and loan chief executive officer, whose termination was ordered by a federal supervisory agent undeniably acting far beyond the scope of his authority. The manner in which the termination was directed, the refusal to retract this direction and the apparent close communication between prospective employers and regulators have acted to cause the executive to remain unemployable in his chosen profession notwithstanding a lengthy and distinguished employment career.

The action was commenced in February, 1989, but has yet to be tried because of Petitioner John W. Behrens' numerous unsuccessful efforts to cause the action to be dismissed on the basis of qualified immunity which have merely delayed the trial and exacerbated the proceedings.

The denial of Mr. Behrens' claim to qualified immunity has already been affirmed by the Ninth Circuit in *Pelletier v. Federal Home Loan*, 968 F.2d 865 (9th Cir. 1992) (hereafter "*Pelletier I*") reprinted at Petitioner's Appendix ("P.A.") 10a. The Circuit Court found a clearly established right to future employment in a chosen profession was violated by Mr. Behrens' alleged conduct but did not reach whether Respondent Robert J. Pelletier had a clearly established right to his employment with Pioneer Savings.

After having his second summary judgment motion denied because of the existence of triable issues of fact, Mr. Behrens sought to take a second interlocutory appeal. The Ninth Circuit dismissed the appeal for lack of jurisdiction because there had already been one interlocutory

appeal. Mr. Behrens sought review by this Court asserting that he was being denied the right to appeal whether Mr. Pelletier had a clearly established right to his Pioneer Savings employment, an issue which had not been decided in *Pelletier I.* However, even if this Court permits him a second interlocutory appeal, Mr. Behrens will still be required to stand trial on the issue of his violation of Mr. Pelletier's clearly established right to future employment in his chosen profession which issue was decided in *Pelletier I.* Thus, the basis for any interlocutory appeal (trial avoidance) is simply not applicable in this case regardless of the outcome.

After certiorari was granted, this Court decided *Johnson v. Jones,* 115 S. Ct. 2151 (1995). To avoid the application of *Johnson,* Mr. Behrens and the two Amicus briefs assert as "given", facts which, to the contrary, have been hotly contested and either have not been decided in the District Court or have been decided against Mr. Behrens in a manner contrary to his assertions to this Court. As a result, this Court must first decide whether any appellate jurisdiction exists as to the appeal sought in this case after *Johnson* is applied. Only if such an issue is raised need this Court address the "One Interlocutory Appeal" rule adopted by three circuits.

Background of the Action

In May, 1986, Respondent Robert J. Pelletier was employed, pursuant to a written employment agreement, as the President and Chief Executive Officer of Pioneer Savings and Loan Association, a California chartered institution whose accounts were insured by the Federal

Savings and Loan Insurance Corporation ("FSLIC").[1] Mr. Pelletier had been so employed for approximately fourteen months; and his employment had been approved by the California Savings and Loan Commissioner. Contrary to the factual assertions contained in Petitioner John W. Behrens' opening brief, Mr. Pelletier's employment with Pioneer Savings was not "conditional" on Mr. Behrens' approval or any other regulatory approval.[2]

Prior to joining Pioneer Savings, Mr. Pelletier had a long and distinguished career in the financial institution industry spanning over 25 years. One of his former positions was as a Senior Vice-President of Beverly Hills Savings and Loan Association, voluntarily resigning in 1984 rather than relocating his residence as requested by his employer. At the time of his departure, Beverly Hills Savings was solvent and undergoing a hostile takeover effort by a shareholder.

Upon leaving Beverly Hills Savings, Mr. Pelletier was asked to become President of Equitable Savings and Loan

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[1] Mr. Pelletier's Statement of the Case is drawn primarily from his declaration filed in the District Court on August 1, 1991 and Samuel T. Rees' declaration filed August 5, 1991, both of which were attached to Mr. Pelletier's Statement Of Genuine Issues Of Material Fact In Opposition To Motions For Summary Judgment, filed on March 14, 1994.

[2] As discussed more fully *infra* in Section I., the "purely legal issue" which Mr. Behrens seeks to have reviewed during his second interlocutory appeal is whether Mr. Pelletier had a "clearly established right" to his employment at Pioneer Savings when that employment was conditioned upon Mr. Behrens' approval. But this "condition" is a hotly disputed factual question which the District Court has not decided in Mr. Behrens' favor.

Association, a troubled financial institution. Pursuant to a regulatory agreement, Equitable Savings was required to secure federal regulatory approval of any new president before such employment was to occur. Equitable requested and promptly received such regulatory approval of Mr. Pelletier's employment. Over the next few months, Mr. Pelletier was successful in causing Equitable to be recapitalized and sold, receiving praise for his efforts. Again, rather than relocate his home to the new headquarters of Equitable in Northern California, Mr. Pelletier voluntarily resigned.

Mr. Pelletier was recruited to join Pioneer Savings as its President after leaving Equitable Savings. In March, 1985, Mr. Pelletier became Pioneer Savings' President and Chief Executive Officer and a member of its Board of Directors. Mr. Pelletier's employment was the subject of a written agreement. Regulatory approval of Mr. Pelletier's employment was promptly sought and secured from the California Savings and Loan Commissioner, Pioneer Savings' primary regulator. However, no federal regulatory approval was sought or even considered until several months after his employment began.

Without any enforceable requirement that it do so, Pioneer Savings applied for the approval of Mr. Pelletier's employment to James Cirona, the Principal Supervisory Agent for the Federal Home Loan Bank Board ("FHLBB") Eleventh District. The application sat for approximately 11 months on the desk of Scott Schultz, Pioneer Savings' initial subordinate supervisory agent, and was never presented to the Principal Supervisory Agent for review. During that time, the FHLBB/FSLIC dealt with Mr. Pelletier as Pioneer Savings' President.

Mr. Behrens was appointed by the FHLBB/FSLIC as a subordinate supervisory agent in 1984. After about a year with this designation, Mr. Behrens replaced Mr. Schultz as Pioneer Savings' subordinate supervisory agent.

Mr. Behrens on May 8, 1986, authored and signed a letter on FHLBB letterhead directing Pioneer Savings Board of Directors to terminate Mr. Pelletier.

Mr. Behrens' May 8 letter was inaccurate in several respects. The letter purported to be a "response" to Pioneer's application to the Principal Supervisory Agent, but Mr. Cirona had never been provided with the application nor had he authorized any such response. The letter also implied that Mr. Pelletier was being investigated by the FSLIC as part of its Beverly Hills Savings failure investigation although no such investigation of Mr. Pelletier was apparently ongoing and Mr. Behrens had *no* evidence of any improper action by Mr. Pelletier.

The Behrens letter was given wide distribution including the entire Eleventh District supervisory staff and the California Savings and Loan Commissioner. It is undisputed that immediately upon receipt of this letter, Pioneer Savings' Directors fired Mr. Pelletier and he has been unable to secure any financial institution position after that regulator-demanded termination.

Intent and purpose were established when shortly after the letter was written, Mr. Behrens bragged to Mr. Schultz that he was finally able to "get rid of Pelletier".

Mr. Behrens' directive commanded such obedience from Pioneer Savings because it was written under color of federal law on federal regulatory letterhead. As a

subordinate "supervisory agent", Mr. Behrens was the line agent responsible for federal oversight of Pioneer Savings and for recommendations on all regulatory applications concerning that institution.

Mr. Behrens, however, was not granted authority to approve Mr. Pelletier's employment nor had Mr. Behrens been granted the authority to remove Mr. Pelletier from his position as a financial institution officer, such authority having been granted by Congress only to the FHLBB/FSLIC under appropriate circumstances and subject to administrative due process rights.[3]

In seeking subsequent employment, Mr. Pelletier naturally has been required to disclose the reason for his termination from Pioneer Savings. Upon learning that this termination was based upon regulatory direction, prospective employers have all declined to employ him. In addition, it is customary in the industry to orally "clear" a senior officer candidate with the "regulators". Mr. Behrens transmission of his May 8 directive to all supervisory staff and the California Savings and Loan Commissioner effectively insured that any such inquiry by a prospective employer would be to a "regulator" who knew of the termination instruction.

Mr. Pelletier also has been utterly unsuccessful in causing Mr. Behrens' termination letter to be either withdrawn or retracted by either Mr. Behrens or the appropriate federal agencies.

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[3] See former 12 *U.S.C.* § 1730 (g),(h) and (q) then applicable and Respondent's Appendix ("R.A.") 2a.

As a result, Mr. Pelletier became essentially unemployable during the time in his life when his income should have been at its highest and provided him and his wife with retirement funds. After nine years, Mr. Pelletier has become technically obsolete in his field. Mr. Pelletier and his wife lost their savings, their vacation property, their credit rating and ultimately their home. They now reside in a trailer and subsist on Social Security retirement benefits.[4]

Procedural History

Mr. Pelletier commenced this action in February, 1989 and for the last nearly seven years, has been attempting to cause this action to be tried. The action now consists of two claims: A claim for money damages for violation of Constitutional rights as against Mr. Behrens under the authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and a separate claim for negligence against the United States under the Federal Tort Claims Act (28 *U.S.C.* § 2671, *et seq.*).[5]

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[4] This Court has granted Mr. Pelletier *in forma pauperis* status.

[5] Mr. Pelletier's claims for violation of the Privacy Act (5 *U.S.C.* § 552a) and the Administrative Procedure Act (5 *U.S.C.* § 701-706) as well as his claims asserted against the Federal Home Loan Bank of San Francisco and the statutory successor to the FHLBB/FSLIC were dismissed by the District Court. Since the dismissal orders are not yet final, Mr. Pelletier has not been accorded any appellate review of these dismissals.

A chronological listing of relevant stages of the litigation are set forth at Joint Appendix ("J.A.") 1-6. As noted, Mr. Behrens has already received numerous reviews of his claim to qualified immunity at both the district and circuit court levels.

Briefly, Mr. Behrens moved to dismiss the complaint once service was effected.[6] One of the grounds asserted for dismissal was qualified immunity. While the motion was partially granted on the basis of an erroneous application of the statute of limitations, it was denied on the basis of qualified immunity.[7] J.A. 26. This motion turned out to be the second District Court review of Mr. Behrens' claim of qualified immunity as the issue was also reviewed in connection with Mr. Behrens' request for a discovery stay. J.A. 25.

Mr. Behrens appealed the denial of the motion to dismiss relying on *Mitchell v. Forsyth*, 472 U.S. 511 (1985) to provide appellate jurisdiction. J.A. 42. Included in his issues briefed during this first appeal are the issues

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[6] Mr. Behrens also moved for summary judgment but refused to submit to discovery. The District Court denied this motion without prejudice as premature.

[7] The District Court limited Mr. Pelletier's *Bivens* claims to conduct occurring within one year of suit. Mr. Behrens essentially conceded that the District Court's statute of limitations ruling was contrary to Ninth Circuit authority. J.A. 125. The Ninth Circuit in affirming the denial of qualified immunity also suggested that this statute of limitation ruling was in error. See *Pelletier I*, at P.A. 15a. Upon remand, Mr. Behrens stipulated to modifying the Court's order of October, 1989, on the statute of limitations issue. See P.A. 5a and Mr. Behrens' stipulation.

which Mr. Behrens seeks now to raise in a second appeal. J.A. 120-121.

Mr. Behrens' first circuit court review of his claim to qualified immunity was by a motion panel in connection with his request for a discovery stay. J.A. 51. The stay request was denied.[8] J.A. 127. While his first appeal was being briefed and argued, Mr. Behrens strategically undertook no effort to renew his motion for summary judgment previously denied as premature.

On June 29, 1992, the Ninth Circuit issued its opinion in *Pelletier I*, P.A. 10a, affirming the denial of qualified immunity. The Circuit Court held that Mr. Pelletier had asserted a violation of a clearly established right to pursue a chosen profession free of governmental interference, even though the Court did not reach the issue of whether Mr. Pelletier's specific employment with Pioneer Savings was similarly protected. Contrary to the assertion that the Circuit Court relied on "nebulous theories of conspiracy", the opinion pointed to specific allegations which taken as true and if proven at trial would constitute a claim that Mr. Behrens violated Mr. Pelletier's clearly established rights to pursue his chosen profession. P.A. 23a-24a.

The Ninth Circuit also resolved Mr. Pelletier's assertion that multiple interlocutory appeals of qualified immunity were not required under *Mitchell, supra* and

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[8] As trial approached and no decision had been rendered on the first appeal, Mr. Behrens sought and secured a stay of proceedings in the District Court. J.A. 189 and 227. The Ninth Circuit's stay order remained in force until September, 1993, when the action was finally remanded to the District Court.

that such appeals were abusive and should be restricted to denials of motions for summary judgment.[9]

The Ninth Circuit noted that as a result of the grant of appellate jurisdiction in *Mitchell*, "government defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court's decisions." *Pelletier I.* P.A. at 18a, citing and quoting *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1210 (9th Cir. 1988) and also citing *Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach*, 881 F.2d 816, 817 (9th Cir. 1989). The Court then held that only one interlocutory appeal would be permitted as a matter of right at a time to be chosen by the governmental defendant.

Mr. Behrens' third appellate review of his qualified immunity claim occurred in August, 1992, when he filed his Petition for Panel Rehearing. J.A. 269. By that Petition, Mr. Behrens sought to have the Ninth Circuit reconsider its ruling on qualified immunity and also delete from its opinion that portion which limited him to one interlocutory appeal. By Order, filed September 24, 1993, Mr. Behrens' petition was unanimously denied. J.A. 282. Nevertheless, this opportunity to argue the merits of the qualified immunity claim became Mr. Behrens' third bite at the interlocutory appellate apple.[10]

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[9] Mr. Behrens asserts that *Mitchell* was a two appeal case. However, only one of those appeals was from a denial of qualified immunity. The first appeal concerned absolute immunity.

[10] Mr. Pelletier contends that if Mr. Behrens' motive was something other than delay, he should have filed his Petition for Certiorari immediately following this denial of his Petition for

When the action returned to the District Court nearly four years after the notice of appeal, Mr. Behrens filed a new motion for summary judgment on the basis of qualified immunity. J.A. 283. There were no new legal theories advanced by Mr. Behrens in the summary judgment motion which were not made during the earlier motion to dismiss. This second motion for summary judgment was denied by the District Court nearly a year ago on September 7, 1994. P.A. 2a. The District Court specifically found that material issues of fact remain. See P.A. 5a which is amply supported by Mr. Pelletier's Statement of Genuine Issues etc., filed March 14, 1994.[11]

Mr. Behrens filed a new notice of appeal from this second summary judgment denial. J.A. 5. Mr. Pelletier responded by immediately filing a motion in the Ninth Circuit to dismiss the appeal for lack of jurisdiction and an application in the District Court to have the appeal certified as frivolous. J.A. 373 and 359. On November 7, 1994, the District Court, in fact, found the appeal to be frivolous and thereby put the action back on track for trial. P.A. 8a. Mr. Behrens then applied to the Ninth

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Panel Rehearing as he clearly intended to move again for summary judgment. Indeed, Mr. Behrens also could have moved for summary judgment after his deposition was taken and while the first appeal was being briefed, which would have expedited the process.

[11] Notwithstanding the absence of factual determinations by the District Court, Mr. Behrens asserts in his Opening Brief as "uncontested" his version of the disputed facts. A similar erroneous recitation of the facts is included in the two Amicus briefs.

Circuit for a stay of proceedings in the District Court. J.A. 6.

On November 17, 1994, the Ninth Circuit ruled on the motion to dismiss and the stay application. The Court dismissed the appeal for lack of jurisdiction and denied the stay application. P.A. 1a. By his writ petition, Mr. Behrens has asked this Court to review the dismissal for lack of jurisdiction. Once again, the trial of the underlying action has been stayed.

SUMMARY OF THE ARGUMENT

This Court in *Mitchell, supra,* permitted interlocutory appeals from denials of claims for qualified immunity provided that the appeal sought to determine the "purely legal issue" of whether the right allegedly violated was clearly established. Last term in *Johnson, supra,* this Court determined that an appeal from a denial of qualified immunity which raised only evidence sufficiency issues did not satisfy the finality requirements of *Mitchell* and was not immediately appealable.

Mr. Behrens has asked this Court to review and reverse the determination of the Ninth Circuit dismissing his qualified immunity appeal for lack of jurisdiction because of his prior appeal on the same issue. Certiorari was granted by this Court before *Johnson* was decided.

1. The first issue to be decided is whether certiorari was improvidently granted and whether this case is resolved by applying *Johnson* to the issues sought to be raised by Mr. Behrens.

In order to create a colorable purely legal issue on appeal, Mr. Behrens has asserted as "given", facts which are either hotly disputed or have been decided against Mr. Behrens. For example, Mr. Behrens asserts as "given" that Mr. Pelletier's employment with Pioneer Savings was conditioned upon Mr. Behrens' approval, that Mr. Pelletier was under investigation at the time and that in any event Mr. Behrens never directed termination of employment.

In appealing the denial of a motion for summary judgment after *Johnson*, Mr. Behrens is required to assume as true the factual contentions of the plaintiff on all unresolved triable issues of fact and otherwise use the facts established or decided by the District Court. Mr. Behrens is not free to color the facts on appeal to merely include his contentions, some of which have been rejected.

In this case, Mr. Behrens has not avoided evidence issues on appeal because, had he done so, the purely legal issue he would be required to address is whether he violated Mr. Pelletier's clearly established right to his vested employment as Pioneer Savings' President when without authority and without basis Mr. Behrens directed Pioneer Savings to terminate Mr. Pelletier's employment in order to "get rid of" him. Framed in this light, it is clear that any appeal of this issue by Mr. Behrens would be frivolous and is being avoided for that purpose.

Because Mr. Behrens does not seek to raise the only non-evidentiary purely legal issue resulting from the District Court's denial of summary judgment but instead seeks to have an appellate court judicially resolve

disputed factual issues or overturn contrary factual findings both of which violate *Johnson*'s holding, this case does not raise the "multiple interlocutory appeal" issue for which certiorari was granted.

2. This Court in *Mitchell, supra,* and applying the three-prong test from *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) determined that an interlocutory appeal should be permitted from a denial of qualified immunity primarily because such a claim was an immunity from suit which would be lost if review were delayed until final judgment after trial. In *Johnson,* this Court again used the *Mitchell/Cohen* analysis to determine appellate jurisdiction. Applying the same analysis to this case establishes that the required elements of finality are lacking in this and in any other second interlocutory appeal.

To be appealable after *Johnson,* a purely legal issue must be raised. A second appeal requires an unsuccessful first appeal where such a purely legal issue has been decided adversely to the governmental defendant. The only method by which a governmental defendant may escape trial on the previously decided issue is for that defendant to secure summary judgment for lack of evidence. The denial of such a motion is not appealable after *Johnson.*

If a governmental defendant will be required to stand trial regardless of the outcome of the second appeal he seeks, two of the three-prongs of the *Cohen* test have not been met and the order is not final.

In this case, Mr. Behrens is required to stand trial on the claim that his conduct has precluded Mr. Pelletier

from securing employment in his chosen profession, which right to be free from governmental interference was found to be clearly established in *Pelletier I*. This trial will be required regardless of the outcome of the second appeal he now seeks. The trial became mandated when the District Court denied Mr. Behrens motion for summary judgment finding triable issues of fact. Since the trial will occur, the denial of summary judgment order is not "final" and there is no appellate jurisdiction.

3. The Ninth Circuit, following the lead of the First and Seventh Circuits, has limited a governmental defendant to one interlocutory appeal on the grounds of qualified immunity. This is, of course, one more appeal that the plaintiff receives but was permitted to be taken at a time to be selected by the governmental defendant and presumable when he believes that he is in the best position to prevail. Mr. Behrens believes that he should have at least two and perhaps unlimited interlocutory appeals.

Interlocutory appeals are costly, time consuming and damaging to the rights of the litigants, the district courts' dockets and others seeking relief in the federal courts whose cases are disrupted in the process. The experience of the Ninth Circuit is that governmental defendants will appeal as often as permitted without regard to the merits in a "knee-jerk" fashion. Clearly, there are no economic restraints on such appeals which are financed by governmental employers using government lawyers.

Interlocutory appeals and resulting stays take an enormous toll on efforts to marshall evidence. Stays of discovery preclude a plaintiff from memorializing the facts necessary to prove his case at a time when memories

are fresh. Stays on the eve of trial have an even more damaging aspect as potential trial witnesses may be lost.

In this case, the action was commenced in February 1989 and Mr. Behrens has used his qualified immunity defense and appeal to delay the trial for nearly seven years. Merely from the point of view of delay, the stays in this action have and will delay a resolution by at least 3 years.

The interlocutory appeal process itself also is costly in that on each occasion numerous briefs and memoranda are required. This case has required briefing on seven different stay motions, three merits briefs, a rehearing brief, a certiorari brief and a merits brief in this Court and the case has not even gone through pre-trial. Clearly, another two year appeal process is expected from any jury determination in favor of Mr. Pelletier.

Other litigants also suffer as a result of permitting multiple interlocutory appeals. As Mr. Behrens notes in his brief, governmental agents will always appeal on the eve of trial if permitted to do so. Such an appeal effectively mandates that the trial be continued, thus wasting the time set aside for trial and delaying all other cases on the docket.

Thus, from a pure cost/benefit analysis, a one interlocutory appeal rule is all that should be required.

Judge shopping is another abuse resulting from multiple interlocutory appeals as the likelihood of drawing the same circuit merit panel is reduced as governmental defendants stretch the time between appeals. Providing multiple interlocutory appeals essentially demeans the

decision-making ability of the district judges whose decisions were already affirmed on the first interlocutory appeal.

The statistical argument advanced by Mr. Behrens is misleading. His statistics fail to note the majority of cases which are decided without published opinions, far more likely when the appeal is dismissed or the underlying order affirmed. Additionally, the real issue is the statistical reversal of second appeals, of which none have been found to have been reported to date.

The Ninth Circuit in *Pelletier I* gave the choice of timing of the interlocutory to the governmental defendant. Clearly, this choice will be exercised when the defendant believes that he will have the best opportunity of overturning the decision of the district court and avoiding trial. The governmental defendant knows what acts he committed even if the plaintiff requires discovery. Thus, the defendant is in the best position to know whether his best chance is at the pleading stage or after summary judgment. For policy reasons, the One Interlocutory Appeal rule should be affirmed.

Since the Court need not reach the multiple interlocutory appeal issue to decide this case, since the One Interlocutory Appeal rule is mandated by the principles of *Mitchell* and since there are strong policy reasons supporting a One Interlocutory Appeal Rule, the dismissal for lack of jurisdiction order should be affirmed.

ARGUMENT

I. THERE IS NO APPELLATE JURISDICTION TO REVIEW THE DENIAL OF MR. BEHRENS' SECOND SUMMARY JUDGMENT MOTION AS IT RAISES ONLY EVIDENCE SUFFICIENCY ISSUES HELD LAST TERM IN *JOHNSON V. JONES* TO BE UNREVIEWABLE ON INTERLOCUTORY APPEAL.

In *Mitchell v. Forsyth, supra,* this Court held that a governmental official was entitled to take an interlocutory appeal from the denial of a claim for qualified immunity in order to seek review of the purely legal issue of whether certain given facts violated "clearly established" law. *Id.* at 528.

Last term, this Court decided that an order, which only concerns the sufficiency of the evidence, is not appealable. *Johnson v. Jones,* 115 S. Ct. 2151 (1995). As a result, *Mitchell* and *Johnson* mandate that the facts be "given" to justify an interlocutory appeal. Such a result clearly occurs from a ruling on a motion to dismiss as the Court takes plaintiff's allegations as true. On a motion for summary judgment, however, the factual issues may well not be decided and be subject to conflicting evidence requiring trial. In such a circumstance, the governmental official must assume for purposes of the appeal that the facts are as contended by the plaintiff rather than himself. To do otherwise is to request an appellate determination of contested and disputed issues of fact contrary to the holding in *Johnson.*

The Seventh Circuit in *Johnson* was asked to review the denial of a motion for summary judgment on the grounds of qualified immunity. The plaintiff had alleged

that he had been beaten by the governmental defendants. Certain of the governmental defendants asserted that there was no evidence of their involvement in the beatings and the denial of their summary judgment motion was in error because plaintiff had failed to present evidence of a triable issue of fact on their involvement. The Seventh Circuit determined that it lacked jurisdiction over the appeal and this Court affirmed.

Whether sufficient evidence was presented in the trial court did not raise that neat abstract issue of law which is reviewable on interlocutory appeal. While the governmental defendants in *Johnson* could have appealed the purely legal issue of whether the beating of a plaintiff violated a clearly established right not to be beaten, the governmental defendants obviously chose not to raise that frivolous issue. As a result, appellate jurisdiction was found to be lacking.

In order to raise a colorable claim to qualified immunity on the Pioneer Savings termination issue, Mr. Behrens has asserted as "given", facts which are neither given nor even accurate. Moreover, these misstatements of fact have been repeated in the two Amicus briefs, again as if they are "given" when in fact they are disputed. Needless to say, Mr. Behrens has carefully avoided providing any reference to any order of the District Court where such facts have been determined.

These erroneously assumed facts include: (i) Mr. Pelletier's employment with Pioneer Savings was conditional and required Mr. Behrens' approval; (ii) Mr. Pelletier was under investigation for his involvement with Beverly Hills Savings which precluded his being

approved; and (iii) Mr. Behrens neither directed nor intended to direct Pioneer Savings to terminate Mr. Pelletier's employment.

If one examines the facts as contended by Mr. Pelletier and/or as found by the District Court, Mr. Behrens' appeal issue becomes whether he violated Mr. Pelletier's clearly established right to his vested employment as Pioneer Savings' President when without authority and without basis Mr. Behrens directed Pioneer Savings to terminate Mr. Pelletier's employment in order to "get rid of" him. Framed in this light, it is clear that any appeal of this issue by Mr. Behrens would be frivolous.

Mr. Pelletier clearly has a long established right to a vested employment position free of governmental interference. Such a position is well founded in both federal and California law. See *Truax v. Raich*, 239 U.S. 33 (1915); *Greene v. McElroy*, 360 U.S. 474 (1959); *Merritt v. Mackey*, 827 F.2d 1368, 1373 (9th Cir. 1987); *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975); *Wisconsin v. Constantineau*, 400 U.S. 433 (1972); *California Constitution*, Art 1, § 1; *Endler v. Schutzbank*, 68 Cal. 2d 162 (1968); *Townsend v. Los Angeles County*, 49 Cal. App. 3d 263 (1975); *New Method Laundry Co. v. MacCann*, 174 Cal. 26 (1916); *Purdy & Fitzpatrick v. State of California*, 71 Cal. 2d 566 (1969); *Bautista v. Jones*, 25 Cal. 2d 746 (1945) and *KGB, Inc. v. Giannoulas*, 104 Cal. App. 3d 844 (1980). As properly framed, it is clear that a second interlocutory appeal is unnecessary.

In order to establish the "given" facts, Mr. Behrens should reference the order denying summary judgment. Yet, a review of the summary judgment denial by the

District Court demonstrates that the foregoing factual issues were not "found" by the District Court. As a result, the appellate review now sought by Mr. Behrens must resolve evidence sufficiency issues in order to reach the legal issue posed by Mr. Behrens. This being the case, this Court need not reach the issue of whether multiple interlocutory appeals should be permitted because jurisdiction for the appeal sought by Mr. Behrens is lacking in any event pursuant to the holding in *Johnson*.

For example, Mr. Behrens asserts that the District Court decided that Mr. Pelletier had a clearly established right to an employment position which was expressly subject to Mr. Behrens' approval. See Petitioner's Opening Brief at page 35. However, a review of the order denying summary judgment illustrates that no such determination has been made by the District Court. See P.A. 5a and 6a. Instead, the summary judgment denial specifically found that triable issues of fact precluded summary judgment without making the factual determinations which Mr. Behrens now asserts are "given" facts.

As was demonstrated to the contrary in the District Court, Mr. Pelletier's employment with Pioneer Savings was governed by an unconditional written contract. This contract did not require any federal regulatory approval in order to be effective and none was sought prior to employment. Moreover, Mr. Pelletier's employment was promptly approved by the California Savings and Loan Commissioner, Pioneer Savings' primary regulator, and seemed to have been accepted by the FHLBB/FSLIC.

While it is true that unbeknownst to Mr. Pelletier at the time of contracting, the FHLBB had inserted a condition subsequent into its 1984 resolution granting Pioneer Savings' federal insurance of accounts, this condition only purported to require Pioneer Savings to seek the approval of the *Principal* Supervisory Agent for the Eleventh District of the FHLBB (James Cirona) for any new president it wished to select. Mr. Pelletier has consistently asserted that no authority exists for such a condition *subsequent* to insurance of accounts and that 1984 resolution of the FHLBB purporting to create such a condition was unenforceable. See former 12 *U.S.C.* § 1726.

However, the District Court did not need to reach the issue of enforceability of the 1984 resolution because Principal Supervisory Agent Cirona was never asked by Mr. Behrens to review, approve or disapprove Mr. Pelletier's employment.[12] Moreover, it is undisputed that the FHLBB/FSLIC dealt with Mr. Pelletier as Pioneer Savings' President for the next eleven months and advised him that his employment was not in danger.

A second fact which Mr. Behrens takes as "given" but which has never been established or conceded was that Mr. Pelletier was under some investigation for his involvement with Beverly Hills Savings.

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[12] It is fair to assume that the District Court has found that Mr. Pelletier's employment was not conditional as the District Court did find that neither Mr. Behrens nor Mr. Cirona had the authority to "remove" Mr. Pelletier from his position at Pioneer Savings. The authority to remove is vested solely in the FHLBB. See R.A. 1a-2a and former 12 *U.S.C.* § 1730 (g), (h) and (q).

Beverly Hills Savings was declared insolvent and seized in April 1985 by the federal regulators. This seizure was a little over one year after Mr. Pelletier's voluntary resignation. While an investigation into the cause of the failure was apparently undertaken, there is nothing in the record to suggest that Mr. Pelletier was the focus of any such investigation particularly since he left during a time of its unquestioned solvency. Certainly, Mr. Behrens undertook no investigation of Mr. Pelletier.

Mr. Pelletier's opposition to summary judgment controverted that he personally was the subject of any investigation prior to May 8, 1986, and the defendants' positions contradicted each other and were without evidentiary support. See Mr. Pelletier's Statement Of Genuine Issues at Paragraph A.4.

Also omitted in Mr. Behrens' recitation of the facts was that Mr. Pelletier recently had been approved by Principal Supervisory Agent Cirona to serve as the President of Equitable Savings, a troubled institution. This approval post-dated Mr. Pelletier's employment with Beverly Hills Savings and contradicts any claim of an ongoing investigation.

Finally, Mr. Behrens implies as a given fact that his conduct was neither intended to nor in fact resulted in Mr. Pelletier's termination of employment. Not only is this position belied by the language of his termination directive, the District Court has already found to the contrary based upon the undisputed evidence. See R.A. 1a, Finding 2. Indeed, shortly after his directive was written, Mr. Behrens bragged to a co-worker, Mr. Schultz, that he was finally able to "get rid of Pelletier".

Following *Johnson*, it is either necessary for the District Court to identify the facts upon which it bases its qualified immunity determination or for the Circuit Court to determine which facts must have been established. When triable issues of fact exist, the "purely legal issue" which may be raised by interlocutory appeal requires that the plaintiff's factual contentions be accepted for purposes of argument rather than the governmental defendant's version of the facts. For a Circuit Court to accept the governmental defendant's version of contested facts, it must of necessity make an evidence sufficiency determination that the District Court erred in failing to accept such disputed facts as established. *Johnson* precludes such an interlocutory appellate review.

On this appeal, the District Court has not made findings that Mr. Behrens' version of the facts are established. In some instances, the District Court has made contrary findings. In other instances, the District Court has merely found triable issues of fact. The Ninth Circuit is not in a position to accept Mr. Behrens' version of the facts. Applying the holding of *Johnson* to the issues sought to be raised by Mr. Behrens, no interlocutory jurisdiction exists for the appeal as framed and the dismissal should be affirmed.

II. THE SUMMARY JUDGMENT DENIAL FROM WHICH PETITIONER SEEKS A SECOND INTERLOCUTORY APPEAL IS NOT A "FINAL" ORDER AS IT DOES NOT SATISFY TWO OF THE THREE ELEMENTS FOR FINALITY REQUIRED BY *COHEN V. BENEFICIAL INDUSTRIAL LOAN CORP.* AND WILL NOT ALTER THE REQUIREMENT THAT PETITIONER STAND TRIAL.

Mr. Behrens seeks a second interlocutory appeal, this time to review the denial by the District Court of his

second summary judgment motion which he brought on the eve of trial. The Ninth Circuit dismissed this second appeal for lack of jurisdiction because there had already been one interlocutory appeal on this issue. This ruling was correct in that a second appeal will not alter the requirement that Mr. Behrens must stand trial. Thus, the order now sought to be reviewed is not "unreviewable" as required by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Mitchell, supra,* and *Johnson, supra.* Indeed, any such second appeal of a qualified immunity claim, which is not based upon evidence sufficiency, must of necessity fail the *Cohen* three-prong test for finality.

Mr. Behrens's first interlocutory appeal from the denial of his claim for qualified immunity resulted in the Ninth Circuit's published opinion in *Pelletier I,* at P.A. 10a. In his complaint, Mr. Pelletier had alleged both that Mr. Behrens had caused him to be fired in 1986 from his position as President of Pioneer Savings and thereafter had prevented him from securing any employment in the financial institution field. J.A. 12-13. Mr. Behrens had moved to dismiss the claim.

The District Court partially granted the motion on statute of limitations grounds as to the Pioneer Savings termination claim but denied the motion as to the future employment prevention claim. While the statute of limitations ruling was erroneous, Mr. Pelletier was precluded from appealing that ruling for lack of a final judgment. 28 *U.S.C.* § 1291. Nevertheless, Mr. Behrens sought an interlocutory appellate review on the termination claim and indeed seemed to concede the erroneous statute of limitation ruling.

The Ninth Circuit in *Pelletier I* noted the erroneous statute of limitations ruling on the Pioneer Savings termination claim but did not otherwise decide whether Mr. Pelletier had a clearly established right to retain his position as Pioneer's President free from Mr. Behrens' termination direction. P.A. 15a and 21a. But on the employment prevention claim, the Ninth Circuit ruled that Mr. Pelletier did allege a violation of a clearly established Constitutional liberty interest because Mr. Behrens' alleged post-termination conduct seriously damaged Mr. Pelletier's standing in the community and effectively precluded future work in his chosen profession. *Pelletier I* at P.A. 21a-22a citing *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1100 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Greene, supra,* and *Merritt, supra.*

Upon remand, the District Court corrected its erroneous statute of limitation ruling and reinstated Mr. Pelletier's Pioneer Savings termination claim. Indeed, Mr. Behrens stipulated to that modification of the prior dismissal order to reassert the termination claim. As a result, the action was scheduled to proceed to trial on both the Pioneer Savings termination claim *and* the future employment prevention claim.

On virtually the last day to file pre-trial motions, Mr. Behrens moved a second time for summary judgment. The motion delayed the trial but was ultimately denied because of the existence of triable issues of fact. P.A. 2a. As the trial approached, Mr. Behrens noticed a second interlocutory appeal which again delayed the litigation. The District Court found the appeal to be frivolous and the Ninth Circuit dismissed the appeal for lack of jurisdiction. P.A. 1a and 8a.

This Court first permitted a governmental defendant to prosecute an interlocutory appeal from a claim of qualified immunity in *Mitchell, supra.* In reaching the decision that an interlocutory appeal should be allowed, this Court in *Mitchell* analyzed *Cohen, supra,* and determined that the three-prong test required by *Cohen* to establish finality was sufficiently satisfied so as to allow an interlocutory appeal solely on the purely legal issue raised by a claim of qualified immunity.

Under *Cohen,* an interlocutory order is final and appealable if it conclusively determines the disputed questions, resolves an issue separate from the merits of the action and would be effectively unreviewable on appeal from a final judgment. Primarily, this Court in *Mitchell* reasoned that it was important to allow an interlocutory qualified immunity appeal because a governmental official would lose forever his right to avoid trial if the qualified immunity issue were only reviewed after trial.

The conduct under review in *Mitchell* was whether at the time the Attorney General had authorized a warrantless wiretap, the law precluding such taps was clearly established. No factual dispute was involved in this determination as the conduct at issue had been admitted. This Court found that the law was not clearly established at the time the taps were approved and, thus, the defense of qualified immunity was established.

Last term, this Court decided *Johnson, supra.* As discussed above, the issue in *Johnson* concerned whether an interlocutory appeal lies from a summary judgment denial involving a qualified immunity case when the

underlying facts are in dispute. The Court reexamined the reasoning of *Mitchell* and also applied the three part *Cohen* test. As a result, this Court then held that a denial of a summary judgment motion which raises an evidence sufficiency issue was not immediately appealable. The method of analysis applied in *Johnson* is equally applicable in this case.

This Court in *Johnson* determined that an evidence sufficiency issue did not raise a "purely legal" issue as required by the *Mitchell* analysis. An evidence sufficiency issue also violated the *Mitchell* admonition that the appellate court need not consider the correctness of the plaintiff's version of the facts. As a result, the reasoning of *Mitchell* did not justify an interlocutory appeal.

Using the *Cohen* analysis, this Court held that an evidence sufficiency issue was not a "separate" issue in the sense that it was not significantly different from the fact-related legal issues that underlie a plaintiff's claim. Moreover, this Court found that the competing policy considerations did not justify a relaxation of the separability requirement to permit an evidence sufficiency appeal. Accordingly, the *Cohen* three-prong test was not satisfied so as to permit an interlocutory appeal.

Applying first the reasoning of *Mitchell* to this case, it is clear that a second appeal limited to the Pioneer Savings termination claim will not affect the fact that Mr. Behrens will be required to stand trial on the future employment prevention claim. In *Pelletier I*, the Ninth Circuit found that Mr. Pelletier had a clearly established right to pursue *in the future* his profession free from government interference even though the Court did not

reach the Pioneer Savings employment termination issue. *Pelletier I* did permit Mr. Behrens to move for summary judgment on the future employment issue; but *Johnson* now holds that a subsequent denial of such a summary judgment motion because of the existence of triable issues of fact is not immediately appealable. Since the District Court denied Mr. Behrens' motion for summary judgment because of such triable issues on the future employment claim, Mr. Behrens is required to stand trial on that issue regardless of the outcome of his attempt to secure a second interlocutory appeal sought in this Court.

Unlike *Mitchell* where a decision on the legal issue on appeal would determine whether the Attorney General would be required to stand trial, Mr. Behrens is required to stand trial regardless of the outcome of any second appeal. At best, a second interlocutory appeal could only reduce the scope of issues to be tried rather than eliminate the need for any trial.

In sum, the only way for Mr. Behrens to avoid trial is to receive yet a further interlocutory appeal on the future employment prevention claim, which even Mr. Behrens does not purport to seek by this appeal. Therefore, since Mr. Behrens cannot avoid trial, the rationale underpinning *Mitchell* simply does not exist to require Mr. Behrens to receive a second interlocutory review.

Similarly, the requirements in *Cohen* that the order appealed must be "effectively unreviewable" and "conclusively determine the disputed question" were found to be satisfied in *Mitchell* because a decision would conclusively resolve whether the Attorney General had to stand trial. In this case, though, Mr. Behrens must stand

trial in any event and even a reversal on his requested second appeal will not alter that result. Thus, any second appeal decision will not "conclusively determine" any immunity from trial but may merely resolve one of many legal issues involved in the action.

Because the fundamental goal of *Mitchell* and two of the three prongs of the *Cohen* test are missing in this case, Mr. Behrens should not be permitted a second interlocutory appeal. Moreover, those factors will never be satisfied when a second interlocutory appeal of qualified immunity is at issue.

A *second* interlocutory appeal assumes the existence of a prior *first* interlocutory appeal which the governmental defendant lost in the district and circuit courts. As a result, the first appeal already established that "certain given facts showed a violation of 'clearly established' law." *Mitchell* at 528. Moreover, a second appeal assumes that the district court has resolved a different but still "purely legal issue" not involving evidence sufficiency. For these conditions to have occurred, the governmental defendant of necessity will be required to stand trial on the previously decided issue regardless of the outcome of the second issue; and the second decision sought to be reviewed will not satisfy the *Cohen* three-prong test for finality because a trial will not be avoided.

The Brief of the "United States" attempts to create a hypothetical situation where the theory advanced by the plaintiff through the first interlocutory appeal somehow changes before the second appeal. Solicitor General's Brief at 21. Such certainly is not the case at bar nor indeed has it arisen in any reported decision. The argument

assumes that the plaintiff will voluntarily abandon a theory which he defended for years through the first interlocutory appeal. Such a hypothetical is not realistic and certainly not one which justifies permitting every governmental agent the right to multiple interlocutory appeals.

The Ninth Circuit's experience shows governmental defendants will in fact appeal at every opportunity presented regardless of the merits of such an appeal. See *Pelletier I* at P.A. 18a, citing and quoting *Schwartzman, supra* and also citing *Manhattan Beach Police Officers Ass'n, supra.*

A far more likely scenario is that a governmental defendant will attempt to recast the plaintiff's claim in order to seek a second bite of the interlocutory review apple. The defendant will assert that there has been some "subtle shift" in the plaintiff's theory when the plaintiff defends against a summary judgment motion. If the motion is denied, the governmental official will then notice an appeal, disrupting the docket in the District Court, delaying and exacerbating the proceedings and requiring motion practice to cause the appeal to be dismissed. This type of scenario is much more akin to the type of abuse of the interlocutory appeal process recognized by the three circuits which have already limited defendants to one such appeal.

The simple answer to the issue posed by the Solicitor General is to allow the governmental official to seek permission at the District Court level for a second interlocutory appeal should a legitimate need arise or seek review by writ proceeding should the request be denied.

Under this method, there is no trial delay unless and until a second interlocutory appeal is allowed.

In any event, the finality requirements of *Mitchell* and *Cohen* simply are not met in this case nor are they likely to be met in any case sufficiently to allow a second interlocutory appeal.

III. STRONG POLICY REASONS SUPPORT A SINGLE INTERLOCUTORY APPEAL RULE.

Mr. Behrens correctly notes that three circuits limit a governmental defendant to only *two* appeals from a denial of a claim for qualified immunity. One appeal is interlocutory and one appeal is from the final judgment should the defendant be unsuccessful at trial. Strong public policy reasons support this limitation and there are no fundamental reasons why multiple interlocutory appeals should be permitted. Of course, permitting a governmental defendant even one interlocutory appeal is one more appeal than the plaintiff receives.[13]

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[13] A plaintiff is not permitted to appeal interlocutory rulings limiting his theories. As a result, even a successful appeal by a governmental defendant requires a second appeal by the plaintiff from the final judgment of dismissal in order to review any district court rulings which limited the plaintiff's claims or theories.

This case presents such a situation in that a portion of Mr. Pelletier's Constitutional claims were dismissed because of an erroneous application of the statute of limitation. Mr. Pelletier was not entitled to appeal this interlocutory ruling and Mr. Behrens' appeal did not need to reach the issue. Had the Ninth Circuit not noted the error in passing and had the District Court not reversed itself, Mr. Behrens probably would have been

The Ninth Circuit's determination to impose a "One Interlocutory Appeal" rule was initially stated in *Pelletier I*. The reasoning, however, was restated in *Nelson v. Silverman*, 999 F.2d 417, 418 (9th Cir. 1993), as follows:

> The opportunity to appeal an adverse qualified immunity ruling in advance of trial serves the important purpose of preserving the role of the defense as "an *immunity from suit* rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526, 105 S. Ct. at 2815 (emphasis in original). However, these appeals also exact a price. The price consists principally of the additional expense and delay imposed on a civil rights plaintiff before his case can come to trial. In addition, such appeals interfere with the orderly progress of litigation through the trial courts and limit the ability of district judges to manage their own dockets. In *[Pelletier I]*, we reasoned that one appeal should be sufficient to resolve the legal issues pertinent to a claim of qualified immunity, and hence, that the price is worth paying once but not repeatedly.

See also *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460-461 (9th Cir. 1994).

The Seventh Circuit reached a similar conclusion in *Abel v. Miller*, 904 F.2d 394 (7th Cir. 1990). The Court of Appeals in *Abel* as did the Ninth Circuit in *Pelletier I* noted that the interlocutory appeal process is subject to abuse by governmental defendants, stating:

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required to stand two trials when the error was corrected on appeal from the final judgment.

> Unless courts of appeals are careful, appeals on the authority of *Mitchell* could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail. * * * A single pre-trial appeal is a sound accommodation of competing interests; multiple appeals are not.
>
> *Abel* at 396.

The First Circuit decision on the subject is found in *Kaiter v. Town of Boxford*, 836 F.2d 704, 707-708 (1st Cir. 1988). Both the Seventh and First Circuit opinions predate *Pelletier I*. Indeed, *Kaiter* predates Mr. Behrens' first appeal to the Ninth Circuit and was undoubtedly known by his Department of Justice trial and appellate lawyers when Mr. Behrens made the decision to prosecute an interlocutory appeal at that time.

The theory that the interlocutory appeal process may be used to strategically delay and thus potentially defeat Constitutional claims merely by excessive cost is evident in this case.

This action was commenced in February, 1989, and Mr. Behrens has successfully avoided trial through the present. At a time when the district courts are endeavoring to bring matters to trial within one year, this action is nearly seven years old and has yet to proceed through pre-trial conference.

This action was initially stayed in the District Court until the motion to dismiss could be decided. Discovery

was sought to be stayed in both the District Court and the Ninth Circuit pending the first appeal, which stay was fortunately denied. However, the action was stayed by the Ninth Circuit as the trial date approached and remained in that condition for nearly two years. The action was again stayed by Mr. Behrens' second appeal which stay was temporarily lifted only to be reinstated by this Court. Merely from the point of view of delay, the stays in this action have and will delay a resolution by at least 3 years.

Moreover, interlocutory appeals and resulting stays take an enormous toll, particularly on efforts to marshall evidence. Stays of discovery preclude a plaintiff from memorializing the facts necessary to prove his case at a time when memories are fresh. Stays on the eve of trial have an even more damaging aspect as potential trial witnesses may be lost. The alternative is to require a plaintiff to absorb the cost of video-taped depositions to insure that a jury will see "live" witnesses.

The interlocutory appeal process itself also is costly in that on each occasion numerous briefs and memoranda are required. This case has required briefing on seven different stay motions, three merits briefs, a rehearing brief, a certiorari brief and a merits brief in this Court and the case has not even gone through pre-trial. Clearly, another two year appeal process is expected from any jury determination in favor of Mr. Pelletier.

Further, there are no economic checks on the governmental briefing or motion practice normally found in most cases. As candidly admitted by the Solicitor General, federal governmental agents are usually represented

by governmental lawyers at public expense. The agents need not pay for the costs of defense but are still in a position to direct the defense or to complain when the government lawyer fails to follow the agent's instructions. No reason exists for a governmental agent to be cost effective or to limit motions to those which are believed to be meritorious. Government sponsored lawyers may be more worried about malpractice claims than sanction awards for frivolous appeals. On the other hand, plaintiffs (or their contingency fee counsel) must bear the costs of these protracted proceedings which usually are not recoverable.

Other litigants also suffer as a result of permitting multiple interlocutory appeals. As Mr. Behrens notes in his brief, governmental agents will always appeal on the eve of trial if permitted to do so. Such an appeal effectively mandates that the trial be continued, thus wasting the time set aside for trial and delaying all other cases on the docket.

Thus, from a pure cost/benefit analysis, a one interlocutory appeal rule is all that should be required.

Another abuse resulting from multiple interlocutory appeals is the likelihood that governmental defendants will stretch the time between appeals to insure that they receive a different circuit panel not involved with the first appeal. This type of forum shopping for inconsistent decisions should not be encouraged.

Moreover, providing multiple interlocutory appeals essentially demeans the decision-making ability of the district judges. For there to be a second interlocutory appeal, there must have been a first interlocutory appeal

where the decision to deny qualified immunity must have been affirmed. Since the lower court's decision has already been affirmed once, there is no reason to believe that the district judge suddenly will commit error during his second review. Since no reason exists for believing that the district judges will do less than their normal exemplary job on this issue, no reason exists to micro-manage their decisions by multiple appeals.

Mr. Behrens attempts to use statistics of his own creation to argue that district judges err more often on these issues. See Opening Brief at Pages 20-23. Mr. Behrens' "statistics" fail to take into account the numerous appeals which are dismissed or affirmed without published opinions. Indeed, the type of frivolous appeal of which the Ninth Circuit complained in *Pelletier I* is not likely to result in *any* published opinion and, thus, will not be found in Mr. Behrens' statistics. A more accurate analysis is to note the actual experience of the Circuits which has resulted in three Circuits limiting such interlocutory appeals to one.

Moreover, Mr. Behrens' statistical issue as framed is fallacious. The applicable issue should be the number of reversals occurring as a result of a *second* interlocutory appeal which Mr. Behrens claims is necessary to thwart abuse by the district judges. Since there appear to have been *no second interlocutory appeals* decided in the past, statistical sampling appears to offer no assistance to Mr. Behrens.

No compelling reason exists to require two interlocutory appeals but substantial reasons militate against two such appeals. The overwhelming costs and delay

resulting from such appeals need not be borne by a plaintiff who has already established a right to one triable claim.

The Ninth Circuit in *Pelletier I* gave the choice of timing of the interlocutory appeal to the governmental defendant. Clearly, this choice will be exercised when the defendant believes that he will have the best opportunity of overturning the decision of the district court and avoiding trial. The governmental defendant knows what acts he committed even if the plaintiff requires discovery. Thus, the defendant is in the best position to know whether his best chance is at the pleading stage or after summary judgment.

More importantly, the best check and balance for avoiding frivolous claims is at the District Court level, where judges can control the presentation of the issues to insure that the issue of qualified immunity is decided early on in the proceeding in a manner which causes the least disruption to the litigation process and the governmental defendant.

Mr. Behrens argues that qualified immunity issues should be resolved at the earliest opportunity. However, nothing in *Pelletier I* precludes early review. The early review in this case as in all cases is conducted by the trial court who has the ability to control the proceedings and protect against discovery abuses. The appellate review which is normally at the end of the case may be advanced by the governmental defendant to the very beginning should he believe that it is in his best interest to do so.

For overwhelming policy reasons, this Court should affirm the Ninth Circuits' reasoned One Interlocutory Appeal rule. It provides a fair balance of the interests

which are deserving of protection. However, governmental defendants such as Mr. Behrens have no legitimate interest in merely using the appellate process to effectively deny Mr. Pelletier the relief he is due.

CONCLUSION

When certiorari was sought by Mr. Behrens, this Court had not decided *Johnson, supra*. This Court now precludes appeals from the denial of summary judgment for qualified immunity if such denials are based upon evidence sufficiency. The District Court's order sought to be appealed found that triable issues of fact preclude summary judgment. In an effort to create a colorable "purely legal issue", Mr. Behrens has ignored the trial court order and has, instead, asserted as "given", facts which have been hotly disputed and which have not been decided in Mr. Behrens' favor by the District Court. Since it is clear that Mr. Behrens does not seek an appeal based upon the facts as presented by Mr. Pelletier, Mr. Behrens' attempted appeal is in violation of this Court's holding in *Johnson* and the Ninth Circuit was correct in determining an absence of jurisdiction.

Additionally, the second interlocutory appeal sought by Mr. Behrens is not from a "final" collateral order as required by *Mitchell, Cohen,* and *Johnson, supra*. The resolution of such an appeal will not alter the requirement that Mr. Behrens stand trial on the violation decided in *Pelletier I*. As a result of the first interlocutory appeal, the Ninth Circuit determined that one of the two alleged

violations of Mr. Pelletier's Constitutional rights committed by Mr. Behrens was indeed "clearly established" at the time of the violation. Mr. Behrens now demands a second interlocutory appeal to consider the portion of the first appeal which was not decided, i.e., whether the second violation alleged by Mr. Pelletier also involves a clearly established Constitutional right. If a trial must be held in any event, the denial of summary judgment by the district court is not "final" and no jurisdiction exists for an interlocutory appeal.

Finally, strong policy reasons support a One Interlocutory Appeal rule. Mr. Pelletier has waited nearly seven years for a trial on the merits of his claims. Four of those years have been spent in a prior interlocutory appeal.

Justice delayed is justice denied. Not all *Bivens* claims are frivolous. District judges are fully capable of eliminating frivolous claims without constant and multiple interlocutory appellate oversight. There is no legitimate purpose served by two interlocutory appeals particularly when a governmental defendant is then permitted to appeal from the final judgment. When the appellate process takes two years per appeal (a far more rapid appeal than found in the first interlocutory appeal in this case), the appeal process will consume six years before a deserving plaintiff is permitted to collect what is due.

The One Appeal Rule fashioned by the Ninth Circuit is a fair and reasonable accomodation to competing interests and one which follows the holding in *Mitchell*. It is

respectfully requested that the Ninth Circuits' dismissal be affirmed.

Respectfully submitted,

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